No. 12755

In The United States Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE CO., a Corporation,

Appellant,

vs.

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased, and UNITED STATES OF AMERICA,

Appellees,

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased,

Appellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation, UNITED STATES OF AMERICA,

Appellees.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE CO., a Corporation

BOGLE, BOGLE & GATES
EDW. S. FRANKLIN
Proctors for Appellant
Fireman's Fund Insurance Co., a corporation.
603 Central Building
Seattle 4, Washington.

In The United States
Court of Appeals
For the Ninth Circuit

FIREMAN'S FUND INSURANCE CO., a Corporation,

vs. *Appellant,*

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased, and UNITED STATES OF AMERICA,

Appellees,

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased,

Appellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation, UNITED STATES OF AMERICA,

Appellees.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE CO., a Corporation

BOGLE, BOGLE & GATES
EDW. S. FRANKLIN
Proctors for Appellant
Fireman's Fund Insurance Co., a corporation.
603 Central Building
Seattle 4, Washington.

INDEX

TABLE OF CITATIONS

STATUTES

TEXTS

In The United States
Court of Appeals
For the Ninth Circuit

No. 12755

FIREMAN'S FUND INSURANCE CO., a Corporation,

vs. *Appellant,*

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased, and UNITED STATES OF AMERICA,

Appellees,

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased,

Appellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation, UNITED STATES OF AMERICA,

Appellees.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE CO., a Corporation

STATEMENT DISCLOSING JURISDICTION

This is an appeal from the decree of the United States District Court for the Western District of Washington, Northern Division, sitting in admiralty. The action was instituted by the filing of a libel in personam by libelant

aganst Fireman's Fund Insurance Company and United States of America, seeking an alternative recovery in the amount of $5,000.00 either from Fireman's Fund Insurance Company or United States of America on a seaman's war risk policy. The decree of the lower court dismissed the libel against United States of America, but awarded appellant Mulroy, as Administrator of the Estate of Carl Johnson, deceased, a recovery in the amount of $5,000.00 on a war risk policy issued by Fireman's Fund to crew members of the SS "CAPILLO."

This action, of a maritime nature, is governed by Title 28 (as amended June 25, 1948) §1333, §46 U.S.C. §1128 (d) and the Suits in Admiralty Act, 46 U.S.C. §741 et seq.

STATEMENT OF THE CASE

The SS "CAPILLO," a merchant vessel, was owned by the United States of America and bareboat chartered by the United States Maritime Commission to American Mail Line on March 27, 1940. It sailed from Westport, Oregon, October 17, 1941 for Manila under naval orders and carrying army and navy cargo. Decedent, Oscar Carl Johnson, (who will hereafter be referred to as "decedent") joined the vessel as bosun.

A rider to the Articles provided that American Mail Line would provide insurance for death due to war risks on unlicensed personnel in the principal amount of $2,000.00. (Aps. 77).

To effectuate this war risk coverage, Fireman's Fund Insurance Company issued its Policy No. 6622 (Aps. 47) covering certain enumerated war risks to which the SS "CAPILLO" might be exposed on the voyage. By a rider to the policy the coverage for deaths due to war risks causes incurred by unlicensed personnel was increased to $5,000.00. (Aps. 51, 52). Decedent, as bosun, was classified as unlicensed personnel.

While en route to Manila the decedent developed a lung ailment, and became very ill. He was coughing and expectorating blood, and was removed to the ship's hospital. (Aps. 107). When the vessel reached Port Moresby a doctor was called to see him, who advised that he be immediately hospitalized when the vessel reached Manila (Aps. 106, 107, 108).

The vessel arrived at Manila November 28, 1941. The decedent's condition en route from Port Moresby to Manila became exceedingly worse (Aps. 108). He developed a fever and continually expectorated blood. It was feared he would not survive the trip. (Aps. 108). Because of his exceedingly critical condition the Master broke wartime regulations and sent a radio message to Manila before the arrival of the vessel to have a doctor meet the vessel when it arrived there. The decedent was immdiately taken off the vessel in Manila and placed in St. Joseph's hospital (Aps. 109) on November 28, 1941. Another seaman was promoted to take the decedent's position as bosun.

Subsequently, and while Johnson was receiving medical treatment in the hospital at Manila, the "CAPILLO" left Manila Harbor December 25, 1941 for Corregidor, where it anchored. It was then subjected to incessant daily bombings until December 29, 1941 when the vessel caught fire and was abandoned by the Master and members of the crew, who were all subsequently interned (Aps. 81).

On January 6, 1942 the deceased was likewise interned. The subsequent course and progression of the decedent's illness is reflected in the report of Dr. Hugh L. Robinson, his attending physician (Aps. 44, 45). A preliminary diagnosis of tuberculosis was made. He was treated in various tubercular hospitals without success and later a diagnosis of abscess of the lung was made. He was in the camp hospital at Santo Tomaso prison camp from October 21, 1942 until August 7, 1943, when he died from his prolonged illness (Aps. 82).

The deceased had previously advised Dr. Robinson that dust had settled in his lungs from working in the mines or tunneling, in which work he had been engaged for a number of years. (Aps. 114).

Captain Dreyer, the master of the "CAPILLO" had sailed with the decedent in 1938 at which time he had presented a sickly appearance (Aps. 114, 115).

QUESTION PRESENTED

Where a seaman contracts a progressive and ultimately fatal illness for which condition he is permanently separated from the vessel prior to any declaration of war, and subsequent to the declaration of war is interned for a period of twenty-one months, is his death due to a "war risk" covered by appellant's war risk policy?

LOWER COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The lower court found that at no time prior to the institution of this action had the United States determined that the war risk policy issued by Fireman's Fund on the SS "CAPILLO" provided inadequate protection to the deceased so that coverage under the Second Seaman's War Risk Policy issued by the United States of America became effective (Aps. 22). The court found that the Fireman's Fund war risk policy was in effect on August 6, 1943 when decedent died.

In finding No. 7, the lower court further found that the deceased died "as a direct and proximate result of warlike acts of the enemy Japanese, and by reason of their capture, arrest, restraint and detainment of Carl Johnson, and as a direct and proximate result of the treatment suffered by said seaman while a prisoner as aforesaid, the said Carl Oscar Johnson died in a Japan-

ese War Prison Camp in the Philippine Islands on or about August 6, 1943." (Aps. 23).

The court concluded that appellee Mulroy, as Administrator of Johnson's estate, was entitled to recover the sum of $5,000.00 on the war risk policy issued by Fireman's Fund (Aps. 25) and dismissed the United States of America from the litigation (Aps. 24). A decree in accordance with the foregoing finding and conclusions was thereupon entered, from which appellant has appealed to this Court.

WEIGHT ATTACHED TO LOWER COURT'S FINDINGS

This, being an admiralty appeal, is trial de novo in this court. In the trial below, libelant called no witnesses, resting his case entirely on stipulated documentary evidence. Fireman's Fund called as witnesses Captain Dreyer, master of the "CAPILLO" and an expert medical witness, Dr. Slyfield. There was no conflict in the documentary or oral testimony presented, nor did the trial involve the credibility of any of the witnesses actually testifying. The case was presented and considered by the court below principally as a question of law. Under such circumstances the presumption in favor of the trial court's findings of fact is very nebulous. *The Diamond Cement,* 95 F. (2d) 739 (CCA 9). As this court said in the recent case of *Matson Navigation vs. Pope & Talbot,* 149 F. (2d) 205:

"The rule in admiralty cases is that, although an appeal opens the case for a trial de novo, findings of fact are entitled to great weight, but such rule is modified where the findings are based wholly upon depositions. * * * (citing cases). In cases in which witnesses testify in open court and depositions are also introduced, the rule is subject to modification in the sound judgment of the appellate court."

In the *Ernest H. Meyer,* 84 F. (2d) 496, this court said:

"It is obvious that where the testimony is in part by deposition and in part heard by the court, and the conflict is between the heard and unheard witnesses there cannot be a balancing of credibility between the two."

ASSIGNMENT OF ERROR

(1) The court erred in finding that libelant was entitled to recover under the War Risk Policy issued by Fireman's Fund Insurance Company for the death of Carl Oscar Johnson, Deceased.

(2) The court erred in entering the decree herein. (Aps. 30).

Alternatively, appellant contends that since the United States recognized its liability under the Second Seaman's War Risk Policy for the death of decedent, any recovery should be against the United States and not against Fireman's Fund.

SUMMARY OF ARGUMENT

Fireman's Fund war risk policy did not cover decedent's death for the following reasons:

(1) It was not proximately caused by any peril insured against in the policy.

(2) It occurred on land unconnected with any of the enumerated risks of the policy.

(3) Decedent's death was due to sickness.

(4) The United States recognized Fireman's Fund war risk policy was inapplicable to decedent's death and processed the administrator's claim for allowance under the Second Seaman's War Risk Policy but later rejected the same on the unauthorized and erroneous grounds that decedent's sole beneficiary, his daughter, was not financially dependent upon him at the time of his death.

INSURING CLAUSE IN APPELLANT'S WAR RISK POLICY

The insuring clause in Fireman's Fund war risk policy reads as follows:

> "This insurance covers only contractual liability of the assured for claims for loss of life or injury to or disability of unlicensed personnel, not exceeding eight (8) and unlicensed personnel, not exceeding thirty-two (32), as result of capture, seizure, destruction or damage by men of war, piracy, taking at sea, arrest, restraints and detainments and other warlike operations and acts of Kings, Princes and Peoples in prosecution of hostilities, whether before or after

declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution or rebellion or insurrection, or civil strife arising therefrom, and including the risks of aerial bombardment, floating or stationary mines and stray or derelict torpedoes. In no case shall liability of these Underwriters exceed $5,000.00—each in respect to licensed personnel nor $2,000.00—each in respect to unlicensed personnel.

SCHEDULE ONE

The Assurer will pay, in case of loss, an amount to be determined by applying the percentage shown below to the amount for which the master, officer, or member of the crew is insured, as follows:

(Schedule follows)

The indemnities referred to above are payable, provided loss results directly and exclusively from bodily injuries, within ninety (90) days from the date of accident. Loss shall mean, with regard to hands and feet, arms and legs, dismemberment by severance at or about wrist or ankle, knee or elbow joints, or the complete and irrecoverable loss of function. With regard to eyes, complete and irrecoverable loss of sight. With regard to hearing, total and irrecoverable loss of hearing in both ears.

SCHEDULE TWO

For injury not described in Schedule One, but not for illness, resulting in permanent disability preventing the person injured from performing any and every kind of duty pertaining to such person's occupation, the Assurer will pay compensation at the same rate as the earnings of the injured person immediately preceding the injury, payments to be made in monthly installments until such time as the total compensation as paid shall amount to the principal sum for which the injured master, officer or member of the crew is insured. Notwithstanding anything herein contained to the contrary, it is agreed this in-

surance shall not be vitiated by a deviation or change of voyage of the vessel, in which event an additional premium shall be paid if required."

(Aps. 49).

The language employed in the insuring clause to define war risks is the conventional phraseology employed in the Free of Capture and Seizure Clause (F. C. & S. Clause) usually found in marine policies. Its genesis is explained in Arnould on Marine Insurance and Average (12 ed) p. 19, as follows:

> "In 1898, owing to a feeling that war risks should not be covered by any ordinary insurance, the policy in use at Lloyd's was by a resolution of the members modified by the insertion of the following clause between the clauses numbered (13) and (14) above: "Warranted nevertheless free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." At the beginning of 1899, however, this resolution was superseded by another resolution which declared that all policies at Lloyd's should contain this warranty against (or, to use a more correct expression, this exception of) war risks, unless the contrary be written or printed in the slip of the agreement previously signed or initialed by the underwriters (j)."

The risks insured against in this policy are those violent risks traditionally incurred by the vessel itself in the case of actual or threatened wartime hostilities. They contemplate death or injuries sustained by a seaman as the proximate result of any of the enumerated risks occurring to the vessel. The disabilities in Schedule I of the policy are limited to injuries sustained

within 90 days from the date of the accident. Schedule II provides for partial disabilities resulting from injury. Disabilities from illnesses are specifically excluded. Incidents occurring on land and totally unrelated to the marine war risks enumerated in the policy are plainly not embraced within its scope.

RULE OF PROXIMATE CAUSE IN WAR RISK POLICIES

It is elementary that the burden of proof is upon the administrator of the deceased to establish by a preponderance of the evidence that the proximate cause of his death was due to one of the hazards or risks enumerated in the Fireman's Fund Policy. In determining the rule as to proximate cause in a war risks policy, the Supreme Court of the United States in the case of *Standard Oil vs. United States of America,* decided November 27, 1950 (1950 U. S. Supreme Court L. ed. Advance Opinions, page 106, said:

> "Proximate cause in the insurance field has been variously defined. It has been said that proximate cause referred to the "cause nearest to the loss." Again courts have properly stated that proximate cause referred to the cause nearest in point of time to the loss. But the true meaning of the maxim is, that it refers to that cause which is most nearly and essentially connected with the loss as its effectual cause."

In the same opinion, Judge Frankfurter observed:

> "The scope of the undertaking to cover for such losses is partly the law's confirmation of the settled

understanding of those whose business is shipping—their undertanding of what contingencies the undertaking covered. It is partly the law's endeavor, in view of the inevitable treacheries of language, to shield the insurer from liability for loss on the basis of a factor too remote, and therefore too tenuous in the combination of elements that converge towards the loss."

This court was called upon to apply the doctrine of proximate cause in war risk policies in the case of *Link vs. General Insurance Company,* 173 F. (2d) 995.

DECEDENT'S ILLNESS AND DEATH NOT PROXIMATELY DUE TO WAR RISK

It is uncontradicted that decedent's death was due to a progressive and fatal illness which began aboard the "CAPILLO" sometime prior to November 17, 1941. His fatal illness began prior to the declaration of war against Japan. As a result of his illness (and likewise prior to the declaration of war, on November 29, 1941 the decedent was obliged to leave the vessel at Manila to undergo hospital treatment and permanently separated from the vessel at that time. He never rejoined the vessel thereafter. His progressive illness was in no way connected with the subsequent bombings of the "CAPILLO" at Corregidor on December 25, 1941. This was a risk covered by appellant's policy.

The finding of the lower court that the decedent's death was due to his "capture or arrest, restraint or detainment" fixes a liability upon appellant for death due

to disease and to the alleged results of shore-side confinement, risks which were specifically negative by the express terms of the policy itself.

Presumably, the lower court, in referring to decedent's "treatment" after internment, proceeded upon the theory that dietary deficiencies which may have been experienced by the decedent while a prisoner and the inability to perform an operation for a lobectomy upon decedent were the contributing proximate causes of decedent's death and risk insured against by Fireman's Fund Insurance policy. The court's questioning of appellant's two witnesses justifies this assumption. In Article VII of the Amended Libel, it was alleged that because of the "detention of, treatment and hardship inflicted upon the said Carl Johnson" he died (Aps. 6).

This finding is highly speculative and conjectural and has no factual basis. Captain Dreyer stated that living conditions in the internment camp were good until May of 1943 while the civilians were in charge (Aps. 117).

The report of Mr. Everett, the Manila agent for American Mail Line, under date of April 11, 1945 found in United States Exhibit No. I states that decedent died while camp conditions were at their best. Undoubtedly, decedent like others suffered hardship and privations, compared with normal civilian life, but his prison camp environment cannot be said to be the dominant cause of

his death. Dr. Slyfield testified malnutrition was a minor factor in decedent's death (Aps. 122).

Other than the report of Dr. Robinson (Aps. 44-46 inc.) who recommended a lobectomy operation upon decedent, appellee introduced no medical testimony as to the proximate cause of decedent's death. Dr. Frederick Slyfield, a leading chest specialist of Seattle, testified that in his opinion deceased's fatal disease developed aboard the SS "CAPILLO" November 1, 1941 (Aps. 120) and progressed in the usual fashion of lung abscesses until his subsequent death; that prior to the advent of penicillin 75% of persons suffering from lung abscesses died; that it was exceedingly unlikely that the deceased could have survived the performance of a lobectomy upon him because of the long continued abscess of the lungs from which he had suffered and which eventually caused his death (Aps. 102).

It is respectfully urged that the findings of the lower court are completely lacking in evidential bases in classifying decedent's death as being proximately caused by any enumerated war risk in the Fireman's Fund war risk policy, and that the same are plainly erroneous and should be reversed and a decree of dismissal entered in favor of Fireman's Fund Insurance Company.

WHAT ARE WAR RISKS?

The mere fact that in time of war a member of the crew of a merchant vessel was injured or died or loses his life and there is a policy covering him against "war risks" does not entitle him or his representatives to recover against the one so insuring unless the injury or death is a result of a risk of war. The war must be the proximate cause of the fatality. *Dennehy vs. U. S.*, 15 F. (2d) 196.

In a series of cases involving the Second Seaman's War Risk Policy, the courts have been called upon to construe war risks as the term is employed in the broader coverage of that policy, compared with the restrictive phraseology of appellants policy.

In *Gadsen vs. U. S.*, 54 F. Supp. (U.S.D.C. Md.) Judge Chesnut, in denying recovery under a Second Seaman's War Risk Policy because of the death of a seaman due to heart disease, which was a result of him being "badly scared" by a submarine alarm, said:

> "The weight of the evidence in the case shows that the death of the deceased was due to disease and not to a war risk The policy is generally referred to as "war risk insurance." It is also very doubtful indeed whether the aggravation of the heart disease from which the seaman in this case was suffering by being badly scared by the submarine alarm would constitute a "bodily injury" within the fair meaning of the policy. See 11 C.J.S. bodily—376-377."

In *Carson vs. U. S.*, 89 F. Supp 114, a seaman who was returning to a ship after midnight during the

blackout fell from a bridge and was injured and filed a claim under the Second Seaman's War Risk Policy. The court said:

> "The review of the judicial decisions cited by counsel confirms my previously tentatively expressed view that the accident is not within the coverage of the policy. It will be noted that the coverage is principally based on personal injuries "directly and proximately caused by risks of war and war-like operations." The particular inclusions are those which are peculiarly applicable to ships and seamen and the personnel covered by the policy are the masters, officers, and crews of vessels and "other persons employed or transported thereon" against the loss of life, personal injury, or detention related to the prosecution and defense of hostilities. *The wording of the insuring clause, is, therefore, seemingly not applicable to accidents resulting in personal injury occurring on land and not directly associated with the ship.* An aerial bombardment is mentioned as included in the insuring clause, but there is no evidence that there was any aerial bombardment at the time of the libellant's injuries, or that it was caused thereby." (Italics ours).

In *Rogel v. United States,* 84 F. Supp. 781 (U.S.D.C. E.D.N.Y.) liability under the Second Seaman's War Risk Policy was denied to a seaman who developed a peptic ulcer aboard the vessel because of a lack of evidence establishing that this condition resulted from any of the enumerated war risks in the policy.

In *Ferro v. United States Lines,* 74 F. Supp. 250 (U.S.D.C., E.D.N.Y.), where a seaman disappeared overboard without any evidence to explain his act or connect it with war risk insurance, the claim was denied, the court saying:

"In order to form the basis for a recovery under the policy, the restraints and warlike operations must be shown to be the proximate cause of a seaman's injury or death. *Crist v. United States War Shipping Administration,* D. C. E. D. Pa. 1946, 64 F. Supp. 934. There can be no recovery under the terms of the policy if the injury or death is only remotely or indirectly related to the restraints or warlike operations. The record in this case does not reveal any proximate causal relationship between the restraints and warlike operations enumerated above, and Ferro's death."

In the very recent case of *Faison vs. United States,* 92 F. Supp. 801 (U.S.D.C.) S.D.N.Y.) a seaman while on shore leave was killed when the wall of a building previously damaged by bombardment collapsed He filed a claim under the Second Seaman's War Risk Policy, which was denied. The court in denying recovery said:

"In order to form a basis for a recovery under the Second Seaman's War Risk Insurance Policy for the loss of life of an insured, the risks of war, warlike operations, aerial bombardments and the other risks enumerated in the policy must be shown to be the proximate cause of the seaman's death. Reinold v. United States, 2 Cir., 1948, 167 F. 2d 556, certiorari denied, 35 U. S. 824, 69 S. Ct. 48, 93 L. Ed. 378; Stofey v. United States, D. C. Pa. 1950, 87 F. Supp. 81; Carson v. United States, D. C. Md. 1950 89 F. Supp. 114; Ferro v. United States, S.D. N.Y. 1947, 74 F. Supp. 250. In United States v. Standard Oil Co., 2 Cir., 1949, 178 F. 2d 488, 493, the court defined "war risk" in relation to proximate cause as follows: "Our own court has emphasized that the proximate cause of a loss must have been warlike in order to make the loss a war risk. * * * And search for the 'cause nearest the loss' has been the basis for the determination of liability under analogous circumstances in many

other cases. * * * Thus we believe a correct statement of the American rule to be that under a policy which expressly insures against war risks or 'all consequences of hostilities or warlike operations,' the coverage extends only to perils due directly to some hostile action, military maneuver, or operational war danger, and does not include the aggravation or increase of a maritime risk because of war operation. * * *"

"* * * Another factor which bars recovery under the Second Seaman's War Risk Insurance Policy in this case is the fact that the injury causing death was sustained ashore while the seaman was on leave and it was not directly associated with the ship."

Even injuries occurring on shipboard due to a warlike environment but not proximately due to an enumerated war risk are held non-compensable.

In *Reinold vs. U. S.,* (2 CCA) 167 Fed. (2d) 556, the death of the mate due to an intoxicated member of the armed guard, was held not the result of "warlike operations" or "acts in prosecution of hostilities."

A similar conclusion was reached in *Chandler v. U. S.,* 94 F. S. 580 (U.S.D.C. S.D.N.Y.) where a seaman was severely injured aboard the ship while examining a war souvenir which exploded.

These authorities clearly indicate the error of the lower court's findings and decree in holding that decedent's death on shore many months after a pre-war contracted illness constitutes a war risk under appellant's policy.

IF DECEDENT'S DEATH DUE TO "WAR RISK" COVERAGE ASSUMED BY UNITED STATES UNDER SECOND SEAMAN'S WAR RISK POLICY

The statutory authority for merchant seamen's war risk insurance is found in the Merchant Marine Act of 1936 as amended, (46 U.S.C.A., Sec. 1128 to 1128g). Title 46, Section 1128 (a) (e) authorizes the insurance by the government of crew members against loss of life, personal injury or detention by an enemy of the United States following capture.

By an amendment dated April 11, 1942, Title 46, Section 1128 (g) the insuring authority was transferred from the United States Maritime Commission to the War Shipping Administration.

Title 46, Section 1128 (a) authorized the War Shipping Administration to provide such merchant crew war risk insurance "where it appeared" (1) such insurance adequate for the needs of transportation in the water-borne commerce of the United States and its Territories and possessions (including the Philippine Islands, the Canal Zone, and any bases or lands leased or occupied by or on behalf of the United States), or of other transportation by water or other vessel services deemed by the Commission to be in the interest of the war effort or the domestic economy of the United States,, cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a State of the United States, or (2)

the furnishing by the Commission of such insurance or reinsurance with respect to any such transportation or other vessel services at nominal or other rate basis would be of material benefit to the war effort, or (after consultation with the Office of Price Administration or other agencies) to the domestic economy of the United States, or (after consultation with the Secretary of the Navy or the Secretary of War) is necessary or advisable for military or naval reasons."

At the outset of the second World War merchant marine crew insurance was initially effected in many in many instances against war risk through private insurance companies. The type of insurance written proved to be too restrictive in scope and ill adapted to afford the broad protection to newly developing war risks which the government felt merchant seamen should have. To afford more liberal war risk protection to merchant seamen, which private companies were unwilling to give, Title 46, Section 1128 (a) was amended March 24, 1943 by Chapter 26, Public Law 17, Title 50, War Appendix, Section 1292, reading in part as follows:

> "* * * (b) Whenever the Administrator, War Shipping Administration, finds that, on or after October 1, 1941, and before thirty days after the date of enactment of this subsection, a master, officer, or member of the crew of, or any persons transported on, a vessel owned by or chartered to the Maritime Commission or the War Shipping Administration or operated by or for the account of, or at the direction or under the control of the Commission or the Administration, has suffered death, injury, detention,

or other casualty, for which the War Shipping Administration would be authorized to provide insurance under Subtitle—Insurance of Title II of the Merchant Marine Act, 1936, as amended by this Act (Title 46 §1128a), the Administrator may declare that such death, injury, detention or other casualty, shall be deemed and considered to be covered by such insurance at the time of the disaster or accident, if the Administrator finds that such action is required to make equitable provision for loss or injury related to the war effort and not otherwise adequately provided for: *Provided,* That in making provision for insurance under this subsection the Administrator shall not provide for payments in excess of those generally provided for in comparable cases under insurance hereafter furnished under the said Subtitle—Insurance of Title II (Title 46 §1128a) as amended: *Provided further,* That any money paid to any person by reason of insurance provided for under this subsection shall apply in pro tanto satisfaction of the claim of such person against the United States arising from the same loss or injury. There shall be no recovery of any money paid on account of insurance provided for the masters, officers, or members of the crew, or individuals transported on, any vessel under this sub-section or under Subtitle — Insurance of Title II of the Merchant Marine Act, 1936, as amended (sections 1128-1128h of Title 46), from any person who in the judgment of the Administrator, War Shipping Administration, is without fault, and when in the judgment of the Administrator such recovery would defeat the purposes of benefits otherwise authorized or would be against equity and good conscience. The declarations, findings, and actions of or by the Administrator under this subsection shall be final and conclusive. * * *."

This legislation is familarly referred to as Public Law 17 or the Clarification Act of 1943.

The Congressional reasons impelling its enactment are explained in the report of the Senate Committee on

Commerce, Page 213, U. S. Code, Congressional Service, 78th Congress, 1st Session, 1943, reading as follows:

> "Insurance protection for seamen" — Another problem primarily affecting seamen and their dependents is the need of providing more complete protection to seamen and their dependents in case of loss of life or bodily injury to such seamen. Notwithstanding the apparent intent of Congress to provide adequate insurance protection under the revision to the War Risk Insurance Act approved April 11, 1942 (Public Law 523, 77th Cong.), it appears that amendment is necessary to avoid the danger of a denial of insurance benefits in cases of death or injury arising from war conditions not within the strict interpretation of "war risks." That term was, of course, not intended to be construed in its most limited and technical sense, but rather as commonly understood to cover all risks arising out of the war."

Pursuant to this broad statutory authority, the Maritime War Emergency Board of War Shipping Administration promulgated a master policy of war risk insurance upon merchant seamen which it designated as the Second Seamen's War Risk Policy, effective March 15, 1943. It is set out in C. of F. R., 1943 Supp., Title 46, Sec. 341.95, pages 2125, et seq.

By Article II the War Maritime Emergency Board made the Second Seamen's War Risk Policy effective retroactively to risks such as decedent incurred, reading as follows:

> "This decision and the form of insurance policy attached hereto, known as the Second Seaman's War Risk Policy, shall be effective as to all voyages the Articles for which were opened on or after 12:01

A. M. of March 15, 1943. (In those cases in which Articles were not used, the date of the commencement of the voyage shall govern.) Benefits as to all Masters, Officers and Crew Members of vessels the Articles for which were opened before 12:01 A. M. of March 15, 1943 (in those cases in which Articles were not used, the date of the commencement of the voyage shall govern), and who are disabled as a result of a peril insured against by the Second Seamen's War Risk Policy occurring after 12:01 A. M. on March 15, 1943, shall be governed by and payable in accordance with the Second Seamen's War Risk Policy. Life insurance with respect to such personnel shall, however, be governed by and payable in accordance with the terms of the policy covering such personnel on the date of the commencement of the voyage, if Articles were not used); *Provided, however,* That any beneficiary or person who (1) Either is entitled to the benefits of such a policy because of the loss of life of the insured as a result of a peril occurring on or after 12:01 A. M. of March 15, 1943, or (2) Would have been entitled to such benefits if the peril occurring on or after 12:01 A. M. of March 15, 1943, although not a peril insured against under such policy, does constitute a peril covered by the Second Seamen's War Risk Policy,

may receive payments of life insurance benefits in accordance with the provisions of the Second Seamen's War Risk Policy on the condition that such beneficiary or person validly releases and relinquishes all of his rights under such prior policy."

The much broader war risk coverage is set forth in Article III of the Second Seaman's War Risk Policy reading as follows:

"The insurance is for loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention (including the occurrence of other situations hereinafter provided) of the insured, directly and proximately caused by risks of war and warlike operations, in-

cluding capture, seizure, destruction by men-of-war, sabotage, piracy, takings at sea, arrests, restraints and detainments, acts of kings, princes and peoples in the prosecution of hostilities or in the application of sanctions under international agreements, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, scuttling to prevent capture, aerial bombardment, or, attempts at, or measures taken in defense of, all of the foregoing acts, floating or stationary mines, torpedoes, whether derelict or not, collision caused by failure, in compliance with wartime regulations, of said vessel or any vessel with which she is in collision, to show the usual full peacetime navigation or anchorage lights, stranding caused by the absence of lights, buoys, or similar peacetime aids to navigation consequent upon wartime regulations, stranding caused by the failure of said vessel to employ a pilot in waters where a pilot would ordinarily be employed in peacetime, but in which the employment of a pilot is dispensed with in compliance with miltary, naval or other governmental orders, or with a view to avoiding imminent enemy attack (for the purposes of the foregoing, the failure to show lights, the absence of lights, buoys, etc., and the failure to employ a pilot shall be presumed to be the cause of the collision or stranding unless the contrary be proved, and stranding shall include sinking consequent upon stranding or contact with any part of the land), collision with another vessel in the same convoy or collision with any military or naval vessel, that is to say, a vessel manned by and under the control of military or naval personnel and designed to be employed primarily in armed combat service, stranding, collision or contact with any external substance (including ice, but excluding water), as a result of deliberately placing the vessel in jeopardy, in compliance with military, naval or other governmental orders in order to avoid imminent enemy attack, or as an act or measure of war taken in the actual process of embarking or disembarking troops or loading or unloading material of war.

The fact that a vessel, or any vessel with which such vessel is in collision, is carrying troops or military or other supplies, or is proceeding to or from a war base, or is manned or operated by military or naval personnel, shall not alone be sufficient to include in this policy any claim which is not included by the foergoing terms of this article.

The insurance is also for loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention, (including the occurrence of other situations hereinafter provided) of the insured, directly and proximately resulting from stranding, sinking, or break-up of the vessel, explosion or fire causing loss of or substantial structural damage to the vessel, or collision by the vessel or contact with any external substance (including ice, but excluding water), irrespective of whether the same are caused by risks of war or warlike operations or by marine risks and perils."

Where the deceased seaman failed (as did decedent) to designate a beneficiary to receive the benefits of the Second Seaman's War Risk Policy, Subsection C of Article VII of the Seamen's War Risk Policy provides as follows:

"If the insured shall have no lawful widow or widower of him or her surviving but shall have a child or children of him or her surviving, 100% to the child or children in equal shares."

Recognizing that the Fireman's Fund war risk policy issued on the "CAPILLO" was inadequate to provide the necessary coverage to the seamen or protection for the deceased, demanded by Public Law 17, the War Shipping Administration by letter of F. L. Simpson, its Chief Adjuster, dated February 5, 1943, accepted jurisdiction of decedent's claim under Public Law 17

(Exhibit United States of America A-1). The application of Public Law 17 and the Second Seaman's War Risk Insurance to members of the merchant crew of the SS "CAPILLO" was formally signalized by a written agreement entered into on June 9, 1944 between American Mail Line and War Shipping Administration. A photostatic copy of this agreement is found in United States Exhibit A-1. The agreement contains a specific finding that the crew members of the SS "CAPILLO" were subject to Public Law 17 and that the War Shipping Administration was required to make the requisite statutory adjustment as to insurance and other benefits authorized under that law.

After administratively adjudicating decedent's beneficiaries were entitled to the benefits of the Second Seaman's War Risk Policy, the War Shipping Administration caused an investigation to be made as to the dependency of his sole survivor, decedent's daughter, upon him at the time of his death. On August 14, 1944 an ex parte report of the Federal Buerau of Investigation was filed with the Bureau of War Risk Insurance, in which the investigator concluded no dependency existed. Based upon this report of lack of dependency, by letter dated June 19, 1947, the administrator's claim was disallowed, which resulted in the bringing of this action.

It is interesting to note that the claim of another "CAPILLO" seaman, one John Baptist Ball, who like-

wise died in the prison camp, was recognized and paid under the Second Seaman's War Risk Policy.

The administrative disallowance of decedent's claim under the Second Seaman's War Risk Policy after its initial recognition was arbitrary, capricious, and unlawful. There is no statutory or administrative rule making dependency a pre-requisite to benefits. It was conjured out of thin air.

Subsection C of Article VII plainly requires that a beneficiary daughter receive the full face value of the Second Seaman's War Risk Policy in the amount of $5,000 regardless of dependency, where no surviving wife exists. Public Law 17 fails to prescribe dependency as a condition precedent to benefits under the Second Seaman's War Risk Policy. Since the War Shipping Administration made the statutory finding required by Title 46, Sec. 1128 (a) (1) that the Fireman's Fund Policy was not "adequate" coverage for the decedent and other members of the crew of the "CAPILLO," it is respectfully submitted that it then became the mandatory statutory duty of the United States to pay the full benefits of the Second Seaman's War Risk Policy to decedent's daughter regardless of dependency. It is further to be noted that decedent's daughter testified by interrogatories filed in the case that she was actually dependent upon the decedent at the time of his death, and she was not contradicted.

That portion of Finding No. 5 "That at no time did the United States or any officer or agency thereof find

that it appeared or that it was a fact, that the conditions as set out in Section 1128 (a), Title 46, U. S. C., as a prerequisite to furnishing war risk insurance or reinsurance upon the SS "CAPILLO" existed with respect to said voyage so as to bring in force and effect said Second Seaman's War Risk insurance policy covering said Oscar Carl Johnson on said voyage. That in the absence of such finding, the said so-called Second Seaman's War Risk policy did not come into force and effect as to said Oscar Carl Johnson" is plainly erroneous in view of the facts recited above.

It was therefore error for the lower court to hold Fireman's Fund liable on its policy and dismiss the respondent United States of America from liability under the Second Seaman's War Risk Policy and the decree herein should be reversed for that reason.

ANSWER TO CROSS-APPELLANT'S ASSIGNMENT OF ERROR ALLOWING INTEREST ONLY FROM DATE OF JUDGMENT

In cross-appealing from the decree entered in his favor against Fireman's Fund Insurance Company, the Administrator cross-appealed upon the following alleged error.

(2) Denying libelant's motion to vacate the court's minute entered order dated August 16, 1950 directing that Judgment herein "will carry interest only from the date of judgment" (Aps. 33).

In finding No. IX, with reference to the allowance of interest against Fireman's Fund, the court entered the following finding:

> "That libellant has delayed pressing the claim against Fireman's Fund for trial in an effort to establish primary liability against the United States or to secure payment from the United States under the provisions of Title 50, U.S.C., Appendix .1292 (b). That in view of such delay and the fact that the liability of said Fireman's Fund was contingent and unliquidated, it would be an abuse of discretion to allow interest on said claim prior to date of judgment herein."

TRIAL DATE DELAYED BECAUSE OF SETTLEMENT NEGOTIATIONS

No claim or demand for payment under appellant's policy was made by decedent's administrator prior to the institution of the libel on April 3, 1946, in which recovery was sought against it in the event recovery was disallowed against the United States under the Second Seaman's War Risk Policy.

As reflected in the voluminous exhibit, United States Exhibit No. 1, Mrs. Betty Johnson Grant, decedent's daughter, initiated her claim under the Second Seaman's War Risk Policy on July 27, 1944. Negotiations continued between the parties until shortly before the trial of the case at Seattle, Washington on August 15, 1949. In November, 1946 Mr. Mulroy, the deceased's administrator, took over the negotiations for decedent's daughter. Mr. Mulroy was subsequently in Ger-

many from June, 1947 to June, 1949. In his absence the negotiations were conducted by an associate.

The setting of the case on previous occasions had been vacated because of the pendency of these negotiations. The case was finally set for trial at appellant's insistence.

Since appellant's liability was contingent and existed only if the recovery was denied under the Second Seaman's War Risk Policy and since the delay in bringing the matter on for trial was due to the extensive and protracted negotiation between decedent's daughter, her various counsel, and War Shipping Administration, as found by the lower court it would be highly inequitable to award interest against appellant prior to August 31, 1950, the date the decree was entered.

ALLOWANCE OF INTEREST DISCRETIONARY IN ADMIRALTY

It is uniformly held that the allowance of interest is discretionary in admiralty cases.

In *The Stjernbourg,* 106 F. 2d 896, Judge Haney in considering the imposition of interest in the case of delay in the prosecution of litigation said at page 898:

> "Third. Appellants also contend that "in admiralty interest may be properly disallowed or reduced because of unusual delay in the prosecution of an admiralty cause." Appellants concede that they are responsible for a part of the delay, but that "there is a substantial excess of delay justly chargeable to appellee." The record does not disclose which of the

parties caused the delay. The allowance of interest is discretionary. The Albert Dumois, 177 U. S. 240, 255, 20 S. Ct. 595, 44 L. Ed. 751. In the absence of anything in the record disclosing who may be blamed for the delay, we are not warranted in holding that the trial court abused its discretion."

In the case of *U. S. v. Bethlehem Steel Corporation,* 23 F. Supp. 676 is quite similar to the case at bar. The question involved in that case was whether interest should be allowed on an allowance for bonus based upon a percentage of saving. The court said:

"Payment was not due until the saving was determined. This means here that the sum due does not bear interest until ascertained and hence not until judgment recovered. This in theory is no hardship to the contractor. He may press his claim promptly to judgment. He cannot turn it into an investment bearing, as is claimed here, six per cent interest, thereby doubling the final payment to be made."

In the case of *Christian & S. D. Shipping Co. v. Marsh,* (3rd CCA) 31 F. (2d) 686, the court recognized that a libelant was not entitled to interest due to protracted delay. The court said:

"We are not inclined to allow interest for the time the test case was being litigated and for the time taken when the parties were negotiating for a settlement without litigation."

In *The Salutation,* (2 CCA) 37 F. 2d 337, the court in declining to grant interest because of delays in litigation and the claim being unliquidated, said:

"Interest was allowed by the commissioner, and the District Court from June 9, 1920, the time of the filing of the libel. The case was on the calendar and

not tried until October 9, 1924, and the District Court did not enter the interlocutory decree until October 26, 1925. The report of the commissioner was filed January 19, 1928, and the final decree was entered January 22, 1929. This unexplained delay in the prosecution of this case should deprive the appellee of interest on the award. Indeed, it was only after a motion conditionally granted to dismiss for lack of prosecution that the case was brought to trial. Such delays are sufficient reason for forfeiting interest. The James McWilliams (C. C. A.) 240 F. 951; The Edward G. Murray (CCA) 278 F. 895. Interest is discretionary in a court of admiralty. Dyer v. Nat. Steam Navigation Co., 118 U. S. 507, 6 S. Ct. 1174, 30 L. Ed. 153; J. G. Gilcrist (D. C.) 173 F. 666; The North Star (D. C.) 140 F. 263. It was an abuse of discretion to allow interest on this award of damages. In view of these delinquencies of the appellee, interest will be allowed only from January 22, 1929, the date of the final decree. * * *"

"* * * Some of the delay in this litigation to which we referred in denying the appellee interest on the award of damages of the master was due to delay of decision by the court below. The trial judge delayed one year in finding the appellant responsible for the collision, and another District Judge delayed one year in confirming the master's report on the damages. While these unfortunate delays cannot be charged to the appellee, and should not prejudice its rights, still much of the delay in this simple litigation, due to the appellee, was inexcusable, as we indicated in our opinion.

Moreover, the claim is for unliquidated damages, shown by evidence, which, while having sufficient probative force to support the decree, was not free from uncertainty as to the extent of the loss. A wise exercise of judicial discretion requires a denial of interest on the award other than allowed in our opinion."

We respectfully urge that in the event that this court affirms the lower court's decree that its findings as to the disallowance of interest prior to the date of the entry of the decree is proper and should be affirmed.

SUMMARY

In conclusion, appellant respectfully urges that the decree of the lower court adjudging it liable under its war risk policy to appellee administrator be reversed for the reasons stated herein and if the death of decedent be held due to a war risk, that the United States of America be held liable therefore under the Second Seaman's War Risk Policy.

Respectfully Submitted,
BOGLE, BOGLE & GATES
EDW. S. FRANKLIN
Proctors for Appellant